No. 20514

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES MULRY, LEONARD POLONSKY, IRVIN FISHMAN, LAWRENCE LEE, CARMEN YUPPA and ROBERT BARRETT,

Appellants,

v.

WILLIAM DRIVER, Administrator of the Veterans Administration, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLEES

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JURISDICTIONAL STATEMENT

This action was brought in the United States District Court for the Southern District of California against various officials of the Veterans Administration, for the purpose of obtaining judicial review of administrative regulations regarding the conditions of employment of resident physicians employed by the Veterans Administration. (R. 2-12). Plaintiffs are resident

physicians employed at the Veterans Administration Hospital in Long Beach, California. This appeal is taken from a judgment entered October 14, 1965, granting defendants' motion to dismiss the complaint, on the ground of lack of jurisdiction.

The jurisdiction of the district court was asserted under 28 U.S.C. 1331 and 1346 and 5 U.S.C. 1009. The jurisdiction of this Court is based on 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellants, resident physicians at the Long Beach Veterans Hospital, sought a judgment declaring invalid a Veterans Administration regulation (set forth at pages 3-6 infra) prohibiting them from engaging in outside professional activities for remuneration (R. 3). Appellants alleged that this regulation violates the Fifth Amendment in that it deprives them of liberty and property without due process; is arbitrary, capricious and unreasonable; takes private property for public use without just compensation; and deprives appellants of the equal protection of the law. (R. 7-8).

Appellants also sought a declaration that 5 U.S.C. 902, which excludes residents-in-training from the statutory provision guaranteeing federal employees overtime compensation for work over 40 hours a week, denies them equal protection of the laws. (R. 8-9).

Finally, appellants attacked a Veterans Administration regulation requiring employees to refrain from discussing with

unauthorized persons matters under investigation by the Investigative Service of the Veterans Administration (R. 5-6). Appellants alleged that this regulation violates the First Amendment by depriving them of freedom of speech and the press, and the right to petition the government for redress of grievances. (R. 9).[1/]

Appellants alleged that the salaries paid them by the Veterans Administration (which range from $4325 to $7715 per annum) are so inadequate that they are compelled to "moonlight." (R. 6). They further allegedthat the Veterans Administration conducted an investigation into outside professional activities of the Long Beach residents (R. 4-5) and that disciplinary action has been threatened. (R. 7). Finally, they allegedthat they have been warned to refrain from discussing the investigation except with the investigative personnel involved. (R. 17).

The district court granted defendants' motion to dismiss on the ground of lack of jurisdiction. (R. 51).

STATUTES AND REGULATIONS INVOLVED

Department of Medicine and Surgery Supplement, Veterans Administration Manual, MP-5, Part II, Chapter 2, provides in relevant part (R. 44-49):

> b. Restrictions on Outside Professional Activities of Full-Time Physicians, Dentists,

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1/ This regulation, referred to by appellants as "Section 204.06 of the Veterans Administration Regulations", is actually paragraph 204.06 of VA Manual MP-I, part 1, chap. 2. The regulation is based on a published regulation appearing at 38 C.F.R. 1.454.

Nurses, Residents and Interns. Full-time physicians, dentists and nurses are employed on the basis of 24 hours a day, 7 days per week. Such personnel are therefore prohibited from engaging in extra-VA professional activities for remuneration. This prohibition equally applies to residents and interns appointed under the authority of 38 U.S.C. 4114(b). Defined below are certain specific terms and conditions relating to extra-VA professional activities which are prohibited or may be permitted in keeping with the above requirement.

(1) Prohibited Activities

(a) Private Practice

1. Office practice.

2. Consultation practice, with remuneration.

3. Other conventional medical, dental or nursing practice.

(b) Private practice equivalents for purpose of Department of Medicine and Surgery employment.

1. Accepting financial remuneration, directly or indirectly, for rendering a professional, scientific, technical, or administrative service related to their profession, including teaching, from:

a. Another physician, dentist or from any hospital or clinic, including those associated with the VA through a Deans Committee relationship or otherwise;

b. A commercial concern, such as insurance company, surgical instrument, pharmaceutical, or drug firm or manufacturer, dry goods store, hotel, etc.;

c. An industrial concern, such as a coal mine, chemical plant or industry, steel plant, etc.;

d. Teaching in a medical school or other educational institution, including one affiliated with the VA hospital in which the individual is employed, and including not only teaching in undergraduate, graduate, and postgraduate instruction or in the administration of such instruction but also the instruction and administration of instruction of refresher courses, courses for technicians, etc.;

e. Operating or directing a laboratory or clinic, such as:

(1) X-ray laboratory or clinic;

(2) Clinical pathology laboratory;

(3) Bacteriology laboratory;

(4) Pulmonary function laboratory;

(5) Radioisotope laboratory

(6) Radioistope clinic, etc.; or serving as a consultant to such laboratories.

2. When not accepting financial remuneration, directly or indirectly:

a. When (except as a teacher) this practice serves to take the place of a physician or dentist who would otherwise have to perform the service rendered, particularly in situations such as are cited in subparagraph 1, a, b, c and e above.

b. When such action might result in:

(1) Impairing the efficiency of the VA employee in his job;

(2) Being construed as official acts of the VA when it is done by an individual in a private capacity;

(3) Criticism of, or embarassment to, the VA.

(2) Permitted Practices

(a) Acceptance of nonmonetary awards except that a monetary award or prize from a nonprofit organization in recognition of professional achievement or other notable contribution may be accepted with the prior approval of the Chief Medical Director.

(b) Acceptance of a reimbursement for actual expenses incurred in delivering lectures, etc.

(c) Consultation. (An advisory professional opinion in isolated instances involving a single patient without remuneration or responsibility for medical care.)

(d) Performing emergency services without remuneration to those involved in an accident or other bona fide emergency.

Field station heads will report specific circumstances to the Chief Medical Director in any instance in which they are unable to secure compliance with the restrictions enumerated above.

(3) Certification. Each full-time physician, dentist and nurse will be required to sign VA Form 10-1015, Certification--Outside Practice, at entrance on duty. The signed certification will be filed in the personnel folder. A second copy of the form letter will be given to the employee.

* * * * *

Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, provides in relevant part:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

"(e) So far as necessary to decision and where presented the reviewing court shall * * * hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; * * *"

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT IT LACKED JURISDICTION TO REVIEW THE CONDITIONS OF APPELLANTS' EMPLOYMENT

The basic issue in this case is whether there is jurisdictio

1009,[2/] to review the Veterans Administration regulation prohibiting outside employment. Section 10 provides for judicial review "except so far as * * * agency action is by law committed to agency discretion." 5 U.S.C. 1009. The regulation here involved falls within that exception.

Clearly, appellants may not obtain a broader review in this declaratory judgment action than they could obtain if they were discharged for failure to comply with the regulation in question. It has been consistently held that employee discharges are not reviewable by the courts except to determine that applicable procedures have been followed, and that the discharges were in accord with controlling legislation. Seebach v. Cullen, 338 F. 2d 663 (C.A. 9), certiorari denied, 380 U.S. 972; Powell v. Brannan, 196 F. 2d 871 (C.A.D.C.); Keyton v. Anderson, 229 F. 2d 519 (C.A.D.C.); Saggau v. Young, 240 F. 2d 865 (C.A.D.C.). Thus for purposes of the Administrative Procedure Act "employee removal and discipline are almost entirely matters of executive agency discretion." Hargett v. Summerfield, 243 F. 2d 29, 32 (C.A.D.C.), certiorari denied, 353 U.S. 970. The same is true of regulations regarding the conditions of employment, for the violation of which employees may be removed or disciplined.

2/ If there were jurisdiction to review under Section 10, we would contend alternatively that the regulation meets the standards of that Section, since it is a reasonable exercise of the discretion of the Veterans Administration to regulate its conditions of employment. See discussion at page 8 infra.

In the present case, there is no question of procedural irregularity. Nor is there any allegation that applicable legislation has been misconstrued. And appellants' allegations of constitutional violations are no more than a contention that the regulation against moonlighting is arbitrary and unreasonabl

Regulations limiting or prohibiting outside employment are common in the government. Indiviglio v. United States, 299 F. 2d 266 (Ct. Cl.) (Federal Housing Administration); United States v. Drumm, 329 F. 2d 109 (C.A. 1) (Department of Agricultu And while these regulations are frequently aimed at conflict of interest situations, they also on occasion have a broader scope. See 28 C.F.R. 45.9 (professional employees of Department of Justice). It is common knowledge that doctors -- and especially interns and residents-in-training -- work long, irregular hours, and frequently must be continuously on call. In these circumstances, it is not arbitrary and unreasonable for the Veterans Administration to conclude that resident physicians should devote their full time to their principal employment and should not take outside employment.

Appellants are not being denied the right to practice their profession; they are simply being required to confine their practice to the Long Beach Hospital as long as they remain in the resident program there. Appellants feel that this requirement -- which they agreed to upon their employment by the Veterans Administration (R. 14, 18, 21) -- is not a wise policy.

However, the wisdom and advisability of executive policies regarding the conditions of government employment are not matters for judicial inquiry.[3/]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

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3/ Appellants allege that the regulation prohibiting discussion of investigations violates their First Amendment rights (R. 5-6, 9). We submit that this regulation is a reasonable exercise by the agency of its right to limit its employees' discussion of internal agency affairs. In any event, no case or controversy has been alleged as to this regulation, since appellants have not alleged that they have engaged or intend to engage in outside discussion of the investigation, or that there has been any threat to take any disciplinary action by reason of violations of this regulation. United Public Workers v. Mitchell, 330 U.S. 75, 86-91; Longshoremen's Union v. Boyd, 347 U.S. 222; Communist Party v. Control Board, 367 U.S. 1, 70-81.

Appellants' brief does not refer to the allegation of the complaint (R. 8-9, 11) that 5 U.S.C. 902 -- which exempts residents in training from the general provision for overtime pay -- is unconstitutionally discriminatory. Accordingly, we presume the point has been abandoned. In any event, it is clearly reasonable to place professional employees, who are in effect undergoing post-graduate training, in a different category for purposes of the 40-hour work week than most other government employees, especially in view of the well-recognized practice in the medical profession for young doctors to work long and irregular hours.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with these rules.

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